

1 THE HONORABLE THOMAS S. ZILLY
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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

REX - REAL ESTATE EXCHANGE, INC.,

Plaintiff,

v.

ZILLION, INC., et al.,

Defendants.

Case No. 2:21-CV-00312-TSZ

**JOINT STATUS REPORT PURSUANT
TO JULY 28TH HEARING**

Plaintiff REX - Real Estate Exchange, Inc. ("REX") and Defendants Zillow Inc., Zillow Group, Inc., Zillow Homes, Inc., Zillow Listing Services, Inc., and Trulia, LLC (collectively, "Zillow"), by and through their attorneys, respectfully submit this joint status report as ordered by the Court at the parties' July 28, 2023 hearing (see Minute Order dated 7/31/2023).

I. REMOTE JURY SELECTION

The parties agree that jury selection in this matter may proceed remotely.

II. IMPACT OF HOLIDAYS ON TRIAL SCHEDULE

The parties recognize that certain religious holidays overlap with the current trial schedule; most notably, Yom Kippur begins the evening of Sunday, September 24, 2023 and ends the evening of Monday, September 25, 2023. The parties respectfully request that no

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ORRICK, HERRINGTON & SUTCLIFFE LLP
401 Union Street, Suite 3300
Seattle, Washington 98101
+1 206 839 4300

1 trial be held on Monday, September 25, so that any persons involved in the trial—which may
 2 include jurors—be allowed to observe the holiday.

3 III. OTHER ISSUES

4 A. September 8, 2023 Pretrial Conference

5 The parties request that the pretrial conference occur via Zoom.

6 B. Scope Of Trial & Request for Status Conference

7 Zillow's Position: Given the Court's summary judgment ruling on August 16, a vast
 8 number of the more than 1,600 exhibits, 21 witnesses, and 3,000 pages of designated
 9 deposition testimony that REX has identified in its pretrial statement are likely irrelevant.
 10 Zillow has met and conferred with REX, asking REX to narrow the scope of its case, but the
 11 parties have not yet reached agreement. Accordingly, Zillow seeks a status conference for the
 12 parties and the Court to discuss, among other things, how REX intends to reasonably approach
 13 its evidentiary presentation following dismissal of its antitrust claims, as well as the scheduling
 14 of trial days in terms of what days of the week trial will occur, and how long trial will last each
 15 day such that REX and Zillow are aware of their respective trial clocks and can make trial
 16 preparations accordingly.

17 REX's Position: The summary judgment order narrows the claims and issues that the
 18 jury will be required to decide to determine liability. However, as to damages, REX claims
 19 that it is entitled to recover the present value of its lost profits, which is the same as the
 20 enterprise value of the business, because it was driven out of business as a proximate result of
 21 Zillow's violation of the Lanham Act. REX also claims enhanced damages and attorney's fees
 22 based on the exceptional nature of the case pursuant to the Lanham Act. Therefore, REX's
 23 damages-related evidence consists of essentially the same testimony and documents on which
 24 it would have relied had the antitrust claims not been dismissed. That being said, REX is
 25 reviewing its exhibit list and deposition designations to determine what can be eliminated,
 26 particularly evidence that relates solely to NAR, without jeopardizing its ability to present its
 27 damages case to the jury. REX also anticipates that the Court will impose time limitation on

1 the presentation of evidence and, once the Court makes its parameters known, REX will adjust
 2 its designations accordingly. Finally, the parties have not conferred regarding both questions
 3 for the venire and jury instructions because the Court indicated it would provide them to the
 4 parties for their comment and review in the first instance.

5 REX opposes a status conference in addition to the pre-trial conference which is
 6 scheduled for September 8th, 2023 because the issues that Zillow raises can be addressed at
 7 the pre-trial conference.

8 **C. Trial Briefs**

9 The parties seek the Court's guidance as to what would be helpful to the Court to
 10 address in the trial briefs, which are due September 1, 2023. *See* Dkt. 258.

11 **D. Motion *In Limine* Reservation of Rights**

12 Zillow's Position: Following this Court's August 16 order, Zillow promptly reached
 13 out to REX to discuss motions *in limine* related to REX's dismissed claims. Zillow filed a
 14 motion *in limine* on August 17 as required by the Court regarding certain of these issues but
 15 notes that other issues may warrant briefing if the parties cannot agree: (1) Any evidence
 16 regarding a now-rejected agreement between Zillow and NAR; (2) Any communications by
 17 NAR or MLSs, and not involving Zillow, regarding the no-commingling (or any other) NAR
 18 model or actual local MLS rule; and (3) Prevailing commission rates in the U.S. or elsewhere.
 19 Further, Zillow reserves the right to seek to exclude evidence and arguments regarding the
 20 Buyer Broker Commission Rule ("BBCR") pending the Court's ruling on Zillow's *Daubert*
 21 motion to exclude the testimony of David Evans.

22 REX's Position: REX opposes Zillow's "reservation of rights." The deadline for
 23 motions *in limine* has passed. REX responded promptly to any and all of Zillow's requests to
 24 meet and confer regarding motions *in limine* and did so as late as yesterday, August 17, 2023
 25 with regard to an issue Zillow raised for the first time that morning. If Zillow had additional
 26 motions *in limine* that it wished to pursue, it could and should have sought REX's position and
 27 absent agreement, filed its motions prior to the deadline.

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1 DATED: August 18, 2023
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3 BOIES SCHILLER FLEXNER LLP

4 By:/s/ Ursula Ungaro

5 Ursula Ungaro, Esq.
6 Stephen N. Zack, Esq.
7 BOIES SCHILLER FLEXNER LLP
8 100 SE 2nd Street, Suite 2800
9 Miami, FL 33131
10 BOIES, SCHILLER & FLEXNER LLP
11 Telephone: (305) 539-8400
12 Facsimile: (305) 539-1307
13 Email: uungaro@bsflpp.com
14 szack@bsflpp.com

15 Carl E. Goldfarb (*Admitted Pro Hac Vice*)
16 401 East Las Olas Blvd., Suite 1200
17 Fort Lauderdale, FL 33301
18 Telephone: (954) 356-0011
19 Facsimile: (954) 356-0022
Email: cgoldfarb@bsflpp.com

20 David Boies, Esq.
21 BOIES SCHILLER FLEXNER LLP
22 333 Main Street
23 Armonk, NY 10504
24 Telephone: (914) 749-8200
25 Facsimile: (914) 749-8300
Email: dboies@bsflpp.com

26 **Attorneys for Plaintiff REX – Real Estate
27 Exchange, Inc.**

28 McCARTY LAW PLLC
Darren L. McCarty (*Admitted Pro Hac Vice*)
Cristina M. Moreno (*Admitted Pro Hac Vice*)
1410B West 51st Street
Austin, TX 78756
Telephone: 512-827-2902
Email: darren@mccartylawllc.com

29 **Attorneys for Plaintiff REX-Real Estate
30 Exchange, Inc.**

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By: /s/ Aravind Swaminathan

ORRICK, HERRINGTON & SUTCLIFFE
LLP
Aravind Swaminathan (WSBA No. 33883)
aswaminathan@orrick.com
Nicole Tadano (WSBA No. 40531)
ntadano@orrick.com
Aaron P. Brecher (WSBA No. 47212)
abrecher@orrick.com
401 Union Street, Suite 3300
Seattle, WA 98104
Telephone: 206-839-4300
Facsimile: 206-839-4301

Laura Najemy (*Admitted Pro Hac Vice*)
lnajemy@orrick.com
222 Berkeley Street
Suite 2000
Boston, MA 02116
Telephone: 617-880-1800

Paul Stancil (*Admitted Pro Hac Vice*)
pstancil@orrick.com
609 Main Street
40th Floor
Houston, TX 77002
Telephone: 713-658-6446

Jesse Beringer (*Admitted Pro Hac Vice*)
jberinger@orrick.com
1152 15tg Street, N.W.
Washington, DC 20005
Telephone: 202-339-8671

DECHERT LLP
John “Jay” Jurata, Jr. (*Admitted Pro Hac
Vice*)
jay.jurata@dechert.com
Erica Fruiterman (*Admitted Pro Hac Vice*)
erica.fruiterman@dechert.com
1900 K Street, N.W.
Washington, DC 20006
Telephone: 202-261-3440

Russell P. Cohen (*Admitted Pro Hac Vice*)
russ.cohen@dechert.com
One Bush Street, Suite 1600
San Francisco, CA 94104
Telephone: 415-262-4506

1
2 *Attorneys for Defendants Zillow, Inc., Zillow*
3 *Group, Inc., Zillow Homes, Inc., Zillow*
4 *Listing Services, Inc., and Trulia, LLC*

5 **Pursuant to this Court's Electronic Filing
6 Procedure III L, the electronic signatory has
7 obtained approval from all other signatories.